No. 6544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and CHARLES KUGLAND,

Appellants,

vs.

THE CHARLES NELSON COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This is an action instituted by the employers of Charles Kugland, to wit, the Charles Nelson Company, and insurance carrier, Fireman's Fund Insurance Company, under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (23 U. S. C. A.

21), for the purpose of reviewing an award of Warren H. Pillsbury, Deputy United States Compensation Commissioner. The District Court, Southern Division, Northern District of California, enjoined the award of the deputy commissioner and appellants have appealed from said judgment (Tr. p. 25).

The claimant, Charles Kugland, suffered an injury while employed by The Charles Nelson Company as a stevedore. The deputy commissioner computed the amount of award of compensation by applying the provisions of Subdivision (b) of Section 910 of the Act and the District Court held that he should have applied the provisions of Subdivision (c) of Section 910.

A brief statement of the pertinent facts in the case are as follows: The claimant, Kugland, during the year preceding his injury worked approximately 260 days. Part of the time he was on a steady gang, but he had no record of the actual hours that he worked. He took every job he could get and looked for work every day. His average weekly wage was $30 or $35 (Test. Ex. "A" pp. 2-8).

It further appeared from the evidence that one W. Davidson worked as a stevedore 297 days during the year preceding claimant's injury and received as wages the sum of $2,138.95, and the Commissioner used the average daily wage of Davidson in computing the compensation of Kugland under Subdivision (b) of Section 910.

Certain evidence concerning the conditions of employment among longshoremen and stevedores in San Francisco was taken in the case of *Warren H. Pillsbury, Deputy Commissioner, etc., appellant, v. The Charles Nelson Co., et al., appellees,* No. 6543, a transcript of which said testimony is on file in this court in said cause. It was stipulated before the Commissioner at the time of the hearing that said testimony in action No. 6543, was being taken and considered as testimony in action No. 6544, and references herein made to such testimony are to be found in the record of action No. 6543, which testimony is as follows:

Christian N. Hansen, pier superintendent of The Charles Nelson Company, testified that there were three classes of stevedores. The first class is composed of men who have proved themselves the best stevedores and have been working the longest time and are best physically fitted for that kind of work. A second class are the men who come next to the first class; they may be a little unreliable sometimes and are not able to do all the different kinds of work. And the third class is composed of men whom the employers pick up when they have to pick up men for small jobs or when they are short of men (Test. Ex. "B", pp. 5, 6). The stevedores of the first class would average from $160 to $185 and higher, per month. The second class would make from between $125 to $150 per month, and the third class from $65 to $100 per month (Test. Ex. "B", p. 8).

Other witnesses called by the employer testified similarly.

Emil G. Stein, secretary and treasurer of the Longshoremen's Association, testified that he had been connected with the waterfront situation in San Francisco for the past sixteen years and for the last eleven years he was secretary of the organization and his experience has been that there is only one class of stevedores. There are good, bad and indifferent stevedores, but there is only one class and he had never heard it mentioned that there are three classes of stevedores (Test. Ex. "D", p. 40). The basic method of pay of all stevedores is by the hour and in San Francisco they are paid 90¢ an hour (Test. Ex. "A", p. 23).

The deputy Commissioner made the following findings of fact material to this inquiry (Test. Ex. "G"):

1. That the claimant worked steadily at stevedoring in San Francisco during the year preceding his injury, but worked less than 270 days during said year.

2. That claimant sought stevedoring work steadily during said year and was able to perform every stevedoring job available to him.

3. That another employee, to wit, W. Davidson, worked substantially the whole of said year in stevedoring in San Francisco, earning by labor on 297 days thereof, the sum of $2,138.95.

4. That said wages exceeded the maximum prescribed by said Act and claimant's wages are therefore placed at said maximum of $1,950.00 a year under Section 910-(b) thereof.

SPECIFICATIONS OF ERROR.

The specifications of error (Tr. p. 33), all present substantially the same question, to wit: Was there any competent evidence to support the order of the deputy commissioner in fixing compensation under the provisions of Subdivision (b) of Section 910 of the Act?

The Court erred in holding there was none.

ARGUMENT.

Under the authority of

> *Minnie Gunther v. U. S. Employees' Compensation Commission,* 41 F (2d) 151,

the deputy commissioner in fixing compensation, applied the provisions of Subdivision (b) of Section 910 of the Act.

The provisions of the Act relative to fixing the compensation, are as follows:

> "Sec. 910. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken

as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Appellees and the District Court attempt to distinguish this case from the *Gunther* case upon the theory that the class of employees known as stevedores is divided into three distinct classes, the basis for the classification being the number of days a stevedore worked during the year, or, in other words, the amount of wages a stevedore would earn during the year (Tr. p. 22), and that because of such classifications W. Davidson was in a different class than claimant and the deputy commissioner therefore should not have awarded compensation on the the basis of Davidson's earnings. The classification is made in accordance with testimony of the witness Hansen and entirely ignores the testimony of the witness Stein. There is, therefore, in so far as the port of San Francisco is concerned, a conflict in the testimony as to whether or not there was a known recognized classification of stevedores, and the Commissioner was entitled to find, under the testimony of the witness Stein, that there is no such recognized or practical division or classification.

The deputy commissioner's decision upon a question of fact where there is a conflict of evidence, is conclusive, and will not be disturbed by the courts.

Northwestern Stevedoring Co. v. Marshall, etc. Matheson, 41 F. (2d) 28;

Pocahontas Fuel Co. v. Monahan, 34 F. (2d) 549, affirmed 41 F. (2d) 48.

The finding by the District Court that a certain classification of longshoremen and stevedores exists in San Francisco, based upon the amount of money which such individuals have been able to earn in that occupation during the year by reason of the variating period of time during which they may have been able to secure employment, does not seem to be within the meaning of Section 910 of the Longshoremen's Act. To determine for compensation purposes the class to which a man belongs with reference merely to the total amount of money which he has been able to earn, seems to be reasoning in a circle, necessarily eliminating entirely the conception of classification in the industry and leaving for consideration only the single fact of the total individual earnings shown.

It would appear to appellant that the intent of Section 910 of the Act was to give to every man compensation directly related to the wages which he was in fact earning upon the day upon which he was injured. Such earnings manifestly are the earnings of the class to which he belongs and as a member of which he is employed at the time of his injury. The term "class" as thus used, relates to the character of the work which the man was doing in order to earn wages and not primarily to the amount of wages so earned. From this point of view longshoremen may be classified, for example, as gang foreman, hatch tender, winch driver, or the like, and undoubtedly a variation in wages received, and consequently of earning capacity, would thus appear. However, doubt-

less because of free interchange of such classes of work by individuals, no such classification has been attempted and none such has been contended for in this case.

A classification of stevedores based upon the number of days worked during the year or the amount of wages received during the year, is purely mythical. There is no logical reason for dividing the workers into three classes, as on such a basis of classification each individual would be in a class by himself.

The facts in this case are directly in point with the facts in the *Gunther* case. Claimant worked at the same kind of labor, received the same compensation of 90¢ an hour as did the worker Davidson. Davidson was a man who had worked substantially the whole of the preceding year. Claimant was a man who had not worked substantially the whole of the year, but who had followed continuously the occupation of stevedore. It was the practice of such employees to go to certain points or places on or near the waterfront and seek work and to be on hand daily ready for such employment. Under similar state of facts in the *Gunther* case it was held that the provisions of Subdivision B should have been applied, as in the language of the Statute those provisions can reasonably and fairly be applied.

It is therefore respectfully submitted that the Commissioner, in making his award, found that the stevedores working in the port of San Francisco were not divisible into three distinct classes as contended by

appellees, and that in this connection his finding is amply supported by the testimony of the witness Stein and as such is conclusive, and that, there being no such classification, and the claimant and Davidson being in the same class, the case is clearly within the rule of *Gunther v. United States Employees' Compensation Commission,* supra.

Appellants respectfully contend that the decision of the District Court is erroneous and should be reversed.

Respectfully submitted,

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